

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
**Washington, D.C. 20554**

In the Matter of	)	
	)	
Petitions for Declaratory Ruling Regarding	)	<b>MB Docket No. 09-13</b>
Public, Educational, and Governmental	)	
Programming	)	
	)	
Petition for Declaratory Ruling on	)	City of Lansing, Michigan
Requirements for a Basic Service Tier and for	)	CSR-8127
PEG Channel Capacity Under Sections	)	
543(b)(7), 531(a) and the Commission's	)	
Ancillary Jurisdiction Under Title I	)	
	)	
Petition for a Declaratory Ruling That	)	ACM <i>et al.</i>
AT&T's Method of Delivering Public,	)	CSR-8126
Educational and Government Access	)	
Channels Over Its U-verse System Is Contrary	)	
to the Communications Act of 1934, as	)	
amended, and Applicable Commission Rules	)	
	)	
Petition for Declaratory Ruling Regarding	)	City of Dearborn, Michigan <i>et al.</i>
Primary Jurisdiction Referral in City of	)	CSR 8128
Dearborn et al. v. Comcast of Michigan III,	)	
Inc. et al.	)	

**REPLY COMMENTS OF COALITION OF TEXAS CITIES, TEXAS ASSOCIATION OF  
TELECOMMUNICATION OFFICERS AND ADVISORS, AND TEXAS COALITION  
OF CITIES FOR UTILITY ISSUES IN RESPONSE TO THE CONSOLIDATED  
PETITIONS FOR DECLARATORY RULING.**

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Officers and Advisors, and Texas Coalition of Cities for Utility Issues*

April 1, 2009

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**REPLY COMMENTS**

**Introduction:**

These Reply Comments are submitted on behalf of the Coalition of Texas Cities, Texas Association for Telecommunication Officers and Advisors, and Texas Coalition of Cities for Utility Issues (collectively referred to as "Texas Cities")<sup>1</sup> and are submitted in response to the consolidated petitions for declaratory ruling regarding Public, Educational, and Governmental

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<sup>1</sup> Coalition of Texas Cities member cities are: Addison, Allen, Austin, Bedford, Colleyville, El Paso, Farmers Branch, Galveston, Grapevine, Houston, Hurst, Keller, Missouri City, North Richland Hills, Pasadena, Round Rock, Tyler, Westlake, West University Place, and Wharton. See Exhibit "A" for list of the member cities in the Texas Coalition of Cities For Utility Issues (TCCFUI).

programming (“Consolidated Petitions”) and in reply to the comments that were filed on March 9, 2009, in the above-captioned proceedings.

The Texas Cities are several groups of Texas Cities which have been involved in both cable television matters and franchising matters in the State of Texas for over a decade. The Coalition of Texas Cities was established in the early 1990s to monitor both activities at the state legislature and at the Public Utility Commission of Texas on issues concerning cable television and telecommunication matters. The Texas Association of Telecommunication Officers and Advisors is a Texas affiliate of the National Association of Telecommunication and Advisors (“NATOA”), which filed comments herein March 9, 2009. Texas Coalition of Cities for Utility Issues was established in 1995 to monitor and participate in matters in Congress, the Federal Communications Commission, the Texas legislature and at the Public Utility Commission of Texas as issues arose as to local utility franchising matters and cable television matters.

**Texas Cities Support other City Commenters:**

Collectively, the Texas Cities support the Comments as filed March 9, 2009, by the following: the City of Arlington, Texas; the City of Fort Worth, Texas; the City of Houston, Texas; the City of Dearborn, Michigan, *et al.*; the City of Detroit, Michigan, *et al.*; The Michigan Municipal League, *et al.*; NATOA, *et al.*; and the Alliance for Community Media, *et al* (sometimes collectively referred to herein as the “City Commenters”).

The legal issues raised in this proceeding both by the Petitioners and by the City Commenter’s has been adequately briefed by the City Commenters in their initial pleadings and in their collective March 9, 2009 Comments, therefore, the Texas Cities will not add to that briefing but again will add our support to the legal analysis provided by those City Commenters.

**MISCHARACTERIZATION BY CABLE COMMENTERS CONCERNING TEXAS FACTUAL SITUATION**

Texas Cities would note to the Commission that there are at least two mischaracterizations by two commenters as to Texas-specific issues which should be brought to the Commission’s attention. Therefore, these Reply Comments are filed to correct those mischaracterizations of factual situations in the State of Texas.

**AT&T’s statements that the Public, Educational, Governmental Channels (“PEG”) are being streamed in three Texas Cities is in error.**

On page 12 of AT&T’s March 9, 2009, Comments, it states:

AT&T’s PEG product is expanding rapidly. As of February 2009, AT&T provides a total of *approximately 248 streams of PEG programming from 132 cities* and DMA’s [Designated Market Area] *such as ....Dallas, Houston, San Antonio.....*(emphasis added)

At best this sentence states as a fact that all PEG Channels are being streamed by U-Verse in the listed cities, but at a minimum it implies that in those listed cities, including the three Texas cities, that at least some PEG channels are being streamed. That is not a fact in at least two of the three listed cities in Texas. One just needs to look at the March 9, 2009 Comments of the City of Houston as to the status of AT&T streaming the City of Houston's PEG channels and the issues Houston has had with AT&T on an array of issues for over a year, including what equipment is needed to reformat the PEG channels signals to be compatible for the U-Verse system—and even as to what the technical requirements are for that equipments (let alone who is responsible for paying for it.)

With regards to the City of Dallas, as of March 23, 2009, there were NO PEG Channels being streamed for the City of Dallas. (And while there may be other cities in and around the Dallas DMA that may have *some* PEG Channels being streamed, none of those are the City of Dallas's PEG Channels. While this failure to stream any PEG Channels for the City of Dallas may be due to a failure to obtain the correct equipment needed to reformat the PEG Channels into a format to be compatible with AT&T's U-Verse system, the same as has occurred in the City of Houston (*see* the City of Houston's March 9, 2009 filed Comments), the failure of AT&T to stream PEG Channels in the City of Dallas due to a lack of equipment is just not consistent with AT&T's filed Comments where they state that the City of Dallas-not the Dallas DMA-as a city where PEG Channels are being streamed.

The status as to whether any PEG Channels are being actually streamed in the each of the listed cities throughout the nation should be verified directly and independently, with city officials in each of the named cities.

### **Comcast's Mischaracterization as to Texas State Franchising Law**

In Comcast's filed comments of March 9, 2009, on page 18, Comcast makes a reference to various state statutes which allow state cable franchising. In those general statements concerning state franchising, they mischaracterize what the Texas state cable franchising law does or does not do with regard to PEG cablecasting.

On page 18, Comcast states in the text of the March 9, 2009 Comments the following broadly worded statement concerning recently enacted state cable franchising laws. Comcast states as fact that those laws have:

Explicitly provided greater flexibility to new and incumbent cable operators as to tier location and/or digital format of PEG channel. (Citing to Footnote No. 46).

Comcast, to support the above quoted sentence in the text, cites to footnote No. 46. Footnote No. 46 references several recently enacted state laws, including Texas Utilities Code, Chapter 66, §66.009 (d). Texas Utilities Code, Chapter 66, Section 66.009 (d).

Chapter 66, Section 66.009 (d) provides:

Any PEG channel provider pursuant to this section that is not utilized by the municipality for at least 8 hours a day, shall no longer be made available to the municipality, but may be programmed at the cable service provider's or video service provider's discretion. At such time as the municipality can certify to the cable provider or video service provider a schedule for at least 8 hours of daily programming, the cable service provider or video service provider shall restore the previously lost channel which shall be under no obligation to carry the channel on a basic or analog tier.

The first sentence of Section 66.009 (d) clearly sets out utilization criteria for the PEG channel, which if not met, that PEG channel capacity can be used by the cable provider. That sentence does not add new flexibility to what a new or incumbent cable operator may do because that has been the law since at least 1984- if a PEG channel is not used, i.e. goes fallow, the cable operator can use it.

When the 1984 Cable Act was originally adopted the legislative history from the House Report notes this possibility of "fallow" or "dark" PEG channels, and their use by the cable provider.

The 1984 House Report stated that when PEG channel capacity is not being used,

*the needs and interests of cable subscribers would be better served by allowing unused PEG channel capacity to be used by the operator for the provision of other cable services, rather than those channels remaining 'dark' until use of this channel capacity for PEG purposes increases. Section 611(d) [47. U.S.C. Section 531 (d)] ... directs the franchising authority to prescribe rules and procedures for the use of unused PEG channel capacity by the cable operator. (Emphasis added)<sup>2</sup>*

47 U.S.C. Section 531 (d) provides:

*... the franchising authority shall prescribe (1) rules and procedures under which the cable operator is permitted to use [PEG] channel capacity for the provision of other services if such channel capacity is not being used for the purposes designated, and (2) rules and procedures under which such permitted use shall cease. (Emphasis added)*

Thus, 47 U.S.C. Section 531 (d) (1) all but requires that all state franchising laws have a section similar to Texas's Section 66.009 (d) to address what happens when PEG channels go fallow.

The first sentence of Section 66.009 (d), the same as many local franchises have done since at least 1984, establishes the exact minimum criteria of when a PEG channel may be deemed fallow.

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<sup>2</sup> H.R.Rep. No. 98-934, 1984 U.S.C.C.A.N. 4655, at 4684.

The second sentence of Section 66.009 (d) does two things: it gives rights to a municipality to regain a formerly “lost” PEG channel due to a city’s not meeting the minimum utilization criteria as set forth in state law if that city provides a schedule that will demonstrate that they will meet those minimum utilization criteria and, it does provide that the cable provider is under no obligation to carry a reclaimed PEG channel on either the basic or the analog tier. While these may indeed allow “additional flexibility”, it is only under the very limited and narrow statutorily circumscribed circumstances. Section 66.009 (d) does not give any additional flexibility to the cable provider except as to a “lost” fallow PEG channel that is being “reclaimed” by a city.

On its face Section 66.009 (d) of Chapter 66 did NOT provide “....greater flexibility to new and incumbent cable operators as to the tier location and/or digital format of PEG channels.” In fact, it had nothing to do with flexibility on tier locations and/or digital format of PEG channels except in the rare instance of underutilized PEG Channels, essentially fallow PEG channels, which were subsequently “lost” or that had been taken over by the cable provider. This subsection provides the minimum utilization criteria and a procedure for the city to have the “lost” PEG channels returned—and if they are returned this subsection then, and only then, allows a cable provider a choice as to their tier placement and method of transmission.

Whether this Texas law subsection allows more or less flexibility than that provided a cable provider must be viewed in light what flexibility is allowed under any given local franchise in these circumstances, i.e. the limited instance of an underutilized PEG Channels being returned to a city otherwise *this assertion by Comcast is at best speculation, absent a specific comparison of any given state law provision to a specific local franchise provisions on this point.*<sup>3</sup>

Based on Comcast’s faulty legal analysis to the Texas’s state cable franchising law, Texas Cities would urge the Commission to be prudent and review the status of each state law cited in footnote 46 to determine whether any allows more or less flexibility than that provided a cable provider under any given local franchise. This should be verified directly and independently with city officials in each of the states.

Texas Cities appreciate this opportunity to provide clarity to the Commission as to what Section 66.009 (d) of the Texas Utilities Code did and did not do in the narrow area of when a PEG channel becomes fallow, the rights to a city to recover a fallow “lost” PEG channel for its use and if recouped, how the recouped PEG Channel may be re-cablecast based on state law.

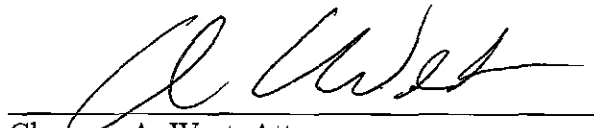
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<sup>3</sup> For instance several cities in Texas (Galveston, Palestine, Pasadena), pursuant to the federal mandate in 47 USC section 531 (d), have PEG Channel Rules which provide what happens when PEG Channels go “fallow”. Using Galveston’s PEG Rules as an example, they provide: “Any time on the Educational or Governmental Access Channel which is not used for access programming shall constitute fallow time, which may be used by the Cable Operator. However, any fallow time not being used by the Cable Operator is subject to immediate use for educational or governmental access programming, and fallow time that is being used by the Cable Operator is subject to priority use by a Educational or Governmental access producer upon 30 days’ written notice by the City.” In Galveston’s case a fallow PEG channel is returned without the detailed utilization schedule as required under state law for its return. So in that instance the state law is *less* flexible than the local franchise.

## CONCLUSION

Texas Cities would urge the Commission to correct the record as to these mischaracterizations as to Texas-specific facts and law. Further, Texas Cities would respectfully ask the Commission grant all three petitions, take any and all additional necessary steps to preserve PEG channels on both AT&T's U-Verse and on Comcast's System, prevent discriminatory treatment of PEG channels, and insure carriage of PEG channels in the basic service tier, except where allowed differently by federal or state law.

Respectfully submitted,

A handwritten signature in dark ink, appearing to read 'Clarence A. West', is written over a horizontal line.

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## EXHIBIT A----TCCFUI Member Cities

Abernathy	Henrietta	Smithville
Addison	Highland Village	Snyder
Alamo	Huntsville	South Padre Island
Allen	Irving	Spearman
Andrews	Jacinto City	Stephenville
Arlington	Jamaica Beach	Sunset Valley
Belton	Kilgore	Sweeny
Benbrook	La Grange	Taylor Lake Village
Big Spring	La Joya	Terrell
Bowie	Lampasas	Thompsons
Breckenridge	Lancaster	Timpson
Brenham	Laredo	Trophy Club
Brookside Village	League City	Tyler
Brownfield	Leon Valley	University Park
Brownwood	Levelland	Vernon
Buffalo	Lewisville	Waxahachie
Canyon	Longview	Webster
Carrollton	Los Fresnos	West University Place
Cedar Hill	Mansfield	Westlake
Center	McAllen	
Cleburne	Midlothian	
College Station	Missouri City	
Conroe	Newark	
Corinth	Nolanville	
Corpus Christi	North Richland Hills	
Cottonwood Shores	Oak Point	
Crockett	Palacios	
Dallas	Pampa	
Denison	Paris	
Denton	Pearsall	
Dickinson	Pflugerville	
El Lago	Plano	
Electra	Port Neches	
Eules	Ralls	
Fairview	Refugio	
Fate	Reno	
Flower Mound	Richardson	
Fort Worth	River Oaks	
Fredericksburg	Rosenberg	
Friendswood	San Marcos	
Frisco	San Saba	
Grand Prairie	Selma	
Grapevine	Seminole	
Gregory	Seymour	